IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

COSMOKEY SOLUTIONS GMBH & CO. KG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 18-1477-JLH-CJB
	)	
DUO SECURITY, INC. n/k/a DUO SECURITY	)	**JURY TRIAL DEMANDED**
LLC and CISCO SYSTEMS, INC.,	)	
	)	
Defendants.	)	

NOTICE OF SUBSEQUENT AUTHORITY

Pursuant to Local Rule 7.1.2(b), Defendant CosmoKey Solutions GmbH & Co. KG ("CosmoKey") provides subsequent authority for (1) CosmoKey's motion to exclude the expert opinions of Lauren Kindler (D.I. 325), on which the Court recently ruled (D.I. 487); and (2) Defendants' motion to exclude the expert opinions of Justin Lewis (D.I. 334), which is pending. The Federal Circuit's *en banc* opinion in *EcoFactor, Inc. v. Google LLC*, No. 2023-1101 (Fed. Cir. May 21, 2025), is attached as **Exhibit A**.

EcoFactor held that the plain language of the lump-sum license agreements on which the expert relied did not provide a basis to opine that the parties agreed to an $X per unit rate. *EcoFactor* at 12. Two agreements relied upon by the expert contained express language disavowing that the payment reflected a reasonable royalty (*id.* at 13), and the disavowals were a basis to exclude the opinion (*id.* at 15). In this case, Defendants' expert Lauren Kindler relied on a lump-sum settlement agreement which contained a disavowal provision. D.I. 326, at 4-6. CosmoKey may file a motion for reconsideration of this Court's Order (D.I. 487).

Relevant to the pending motion to exclude Justin Lewis (D.I. 334) is the opinion of Judge Stark, who wrote:

> The quarrel over how the record before us should be understood should not, however, obscure an important reality: today's decision only governs where an expert's testimony is *undoubtedly contrary to a critical fact* upon which the expert relies. Thus, in the vast majority of patent cases, where the relevant evidence the experts are considering *can* support competing conclusions, the Majority Opinion is inapplicable.

EcoFactor at 41 (Stark, J., concurring in part and dissenting in part). This reasoning applies to

Mr. Lewis's consideration of Duo Push revenue and other evidence. Relying on such evidence,

Mr. Lewis apportioned, out of the royalty base and rate, non-patented features of Duo Push. Mr.

Lewis:

1. Apportioned, out of the revenue ***base***, non-patented features of the higher-tier "Advantage" and "Premier" editions, in order to determine the revenue of the smallest saleable patent practicing unit, the "Essentials" edition (Expert Report of Justin Lewis, D.I. 336-1, Ex. 1, at 26-29);

2. Apportioned non-patented features out of the ***rate*** used in his "income approach," by applying a feature apportionment (*Id.* at 38-46);

3. Further apportioned non-patented features out of the ***rate*** by factoring out authentication methods other than Duo Push (*Id.* at 46); and

4. Considered, as part of *Georgia-Pacific* Factor 13,[1] non-patented features like the "Duo Mobile Application,"[2] which provided a basis to adjust the ***rate*** downward (*Id.* at 72-74).

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[1] *Georgia-Pacific* Factor 13 considers "[t]he portion of the realizable profit that should be credited to the invention ***as distinguished from non-patented elements***, the manufacturing process, business risks, or significant features or improvements added by the infringer." *Id.* at 72 (emphasis added).

[2] *Id.* at 72 ("Though an 'application' is an element of certain claims of the '903 patent, I understand that this patent does not represent the invention of mobile applications that run on these devices.").

Respectfully submitted,

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

Scott T. Weingaertner
Stefan Mentzer
John Padro
Matthew Wisnieff
Lauren Kuehn Pelletier
Timothy Keegan
GOODWIN PROCTER LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018
Tel: (212) 813-8800

Farzad (Fred) Feyzi
GOODWIN PROCTER LLP
601 Marshall Street
Redwood City, CA 94063
Tel: (650) 752-3100

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By: */s/ David E. Moore*
    David E. Moore (#3983)
    Bindu A. Palapura (#5370)
    Andrew M. Moshos (#6685)
    Hercules Plaza, 6th Floor
    1313 N. Market Street
    Wilmington, DE 19801
    Tel: (302) 984-6000
    dmoore@potteranderson.com
    bpalapura@potteranderson.com
    amoshos@potteranderson.com

Attorneys for Plaintiff CosmoKey Solutions GmbH & Co. KG

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